Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-715

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD L. MOORE,
Petitioner,
v.
DAVID LAVICKY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November, 1985

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
(Respondent's Brief in Opposition)

The Respondent, David A. Lavicky, by and through his counsel of record prays that a Writ of Certiorari not be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter. The Petitioner's Brief has been reviewed, and the grounds why the cause should not be reviewed are, as follows:

I. FIRST GROUND WHY THIS CAUSE SHOULD NOT BE REVIEWED.

A. Characterization of "Facts" by Petitioner

Petitioner, Edward L. Moore's, characterization during all appeals of the civil rights trial "findings of fact" by the federal jury. The federal civil rights jury of 1982 did not

find Mr. Lavicky to be the "thief". Mr. Lavicky is today a hardworking citizen of Garfield County, Oklahoma. Mr. Lavicky denied to the federal jury and at all times a stealing of a 1958 pickup out of Alfalfa County despite the 1979 state court conviction of him for that theft. The federal jury was asked by these civil rights Defendants to reweigh Mr. Lavicky's guilt for that theft, and the federal jury did not find him to be a "thief" as Petitioner claims. The federal jury was also not impressed with witnesses the Defense brought into the federal civil rights trial to reiterate what they had said in the state trial to convict Lavicky. These state witnesses were not indicted, although admittedly involved in that 1979 theft. To take what these paraded, "state court witnesses" said as "the statement of facts" of the federal civil rights trial and the federal jury's "findings of fact" is clearly erroneous and misleading.

Statement of Relevant Evidence
Before the Federal Civil Rights Jury

[Tr. = trial transcript & ROA Vol. XI & XII]

On March 15, 1979, Plaintiff was arrested at his home in Enid, Oklahoma, by Defendant Bob Burnett, Deputy Sheriff of Garfield County, for larceny of a 1958 pickup in Alfalfa County (Tr. 14, l. 22). Plaintiff was working on his 1964 Chevrolet pickup truck which was parked in his private parking place at his home (Tr. 14, l. 7). Defendant Bob Burnett allowed Plaintiff to go inside his trailer alone to get a sheet to cover the motor and close the hood with the valve covers off the engine and lock the pickup (Tr. 15, l. 8-12). Thereafter, said Defendant Bob Burnett took Plaintiff to the County Jail in Enid, Okla-

homa, and booked him into jail (Tr. 15, l. 2-3). Defendant Burnett knew that an arrest warrant had been issued in Alfalfa County for Plaintiff's arrest, but no search and seizure warrants were issued or requested in either county, at that time or subsequently, although the jury heard testimony that stolen automobile parts were suspected to be in the possession of the Plaintiff from information the Garfield County and Alfalfa County Sheriff's offices had obtained through interviews on March 8 and 9, 1979, *eight days earlier* (Tr. 276) (Tr. 262, 263, 264) (Tr. 265, l. 14-20).

The next morning, on March 16, Defendant Burnett took time to come to the Plaintiff in jail and asked him if he would sign a consent form for him, Burnett, to search Plaintiff's home and 1964 Chevrolet pickup parked there. Plaintiff advised Defendant Burnett he had nothing to hide, but he would like to see the consent papers and consult with his lawyer before signing them (Tr. 17, l. 6-12; 18-20) (Tr. 18, l. 12-18).

Instead, Defendant Burnett, about 9:00 a.m. on March 16, 1979, got a wrecker service, Peter Martin. Burnett met the wrecker at the entrance to the trailer park in which Plaintiff lived and guided the wrecker to Plaintiff's home (Tr. 72). There at Plaintiff's home the wrecker hooked up Plaintiff's pickup truck at Defendant Burnett's, and possibly Sam Otis's (Tr. 281), direction and hauled it to Franklin Motors' lot in Enid (Tr. 72, 73) (Tr. 252). Defendant Bob Burnett and Defendant Sam Otis (Tr. 276, 1. 14-21), working closely together on the case (Tr. 288, l. 10), had not obtained a search and seizure warrant or consent to seize or search the Plaintiff's pickup (Tr. 287, 1. 16) (Tr. 255-256) (Tr. 18) (Tr. 269-271) (Tr. 454, l. 11 to Tr. 455,

l. 14). Defendant Burnett testified at trial and Defendant Ray Pickle by deposition at trial that Defendant Burnett only assisted Defendant Otis in the hauling of Plaintiff's pickup from Plaintiff's home to Franklin Motors and later only assisted Defendant Otis in the search of the vehicle (Tr. 279-281) (Tr. 454, 455) (Tr. 281, l. 1-24). Defendant Otis did not testify in order to defend himself before the jury, but his deposition was read to the jury where he said he did not go with Burnett to Plaintiff's home and did not know about the taking of Plaintiff's pickup from Plaintiff's home until after Burnett took it to Franklin Motors (Tr. 444, l. 12 and Tr. 445). Conflicting defense statements, therefore, went to the jury.

Some time around noon or shortly thereafter the same day, March 16, Defendant Sam Otis, Deputy Sheriff of Alfalfa County, came from Alfalfa County to the Garfield County Courthouse, *according to Otis's deposition testimony,* talked to Plaintiff (Tr. 442, l. 5), and thereafter Otis and Burnett and the Eckhardt's father and son who were called (Tr. 443, l. 1) (Tr. 223, l. 1-9) and who had had a 1958 pickup stolen in Alfalfa County, went from the Courthouse to the Franklin Motors' lot (Tr. 442, l. 22) and searched Plaintiff's 1964 Chevrolet Pickup (Tr. 443, l.23; Tr. 444, l. 2; Tr. 253). Neither Defendant Otis nor Defendant Burnett bothered to or even tried to obtain a search warrant for this search before leaving the Garfield County Courthouse to go to the Franklin Motors' lot (Tr. 285, l. 1) (Tr. 441) (Tr. 455, l. 2-4). That same day Plaintiff was transported to the Alfalfa County Jail by Defendant Otis (Tr. 443, l. 14).

Five days later and on March 21, 1979, Defendant Otis came to Enid and met at Franklin Motors Defendant Bob Burnett and one Tom Kent who had brought a wrecker from Helena in Alfalfa County on the instructions of the Alfalfa County Sheriff's office (Tr. 20) (Tr. 78-80) (Plaintiff's Exhibit No. 10A; Plaintiff's Exhibit No. 12, ROA Vol. V; Tr. 287, l. 23). Mr. Kent transported Plaintiff's 1964 Chevrolet pickup from Franklin Motors in Garfield County to Helena, Oklahoma, in Alfalfa County (Tr. 80, l. 25). Defendant Sam Otis and Defendant Delmar Coppack had not bothered to get, or ask about getting, and had no search and seizure warrant to take Plaintiff's vehicle out of Garfield County to Alfalfa County. Defendant Burnett and Defendant Pickle of Garfield County did not question this. They treated the matter as if they were just helping Alfalfa County seize and secure the pickup (Tr. 218) (Tr. 454-456) (Tr. 460-461, l. 10-14) (Tr. 456, l. 16-20) (Tr. 451, l. 8-18). Again, at trial Defendant Otis did not testify. Neither did Defendant Coppack or Defendant Pickle, but depositions were read (ROA Vol. VI-IX). Defendant Burnett's deposition was read to the jury where he stated that District Attorney Ed Moore advised Defendant Sam Otis to go and get the Plaintiff's pickup and bring it to Alfalfa County (Tr. 291, l. 16-22). Defendant Moore said the Eckhardts first asked him about getting the pickup soon after they had looked at it in Garfield County at Franklin Motors on March 16, 1979 (Tr. 353, l. 4).

Plaintiff's 1964 Chevrolet pickup was stored at Tom Kent's Garage in Helena from March 21, 1979, to November 7, 1979, without due care (Tr. 85) (Tr. 452, l. 17-24), and testimony was that a stereo was stolen from it there

(Tr. 82, l. 23). On November 7, 1979, pursuant to instructions from the Alfalfa County Sheriff's office, the pickup was transported to the Courthouse in Cherokee for one day (Tr. 23, l. 2-6) (Tr. 81, l. 2-4). Thereafter, it was returned to Kent's garage in Helena by Tom Kent, making a total of 297 days in storage there with over 225 days outside, unprotected (Tr. 81, l. 23-24).

On November 7, 1979, Plaintiff was convicted of larceny of a certain 1958 pickup, mentioned earlier, in the District Court of Alfalfa County, which vehicle had been owned by the Eckhardts (Tr. 48, l. 14) (Tr. 8) (Tr. 130, l. 11) (Tr. 208, l. 22). He was the only one of four boys [Coleman, Mootz, Joslin, Bodell] implicated who was charged with this crime. The other boys testified against him at the criminal trial as they saw fit and for their own benefit. Coleman changes his story as to what he knows or doesn't know about pickup parts depending on who he is talking to (Tr. 375). *Plaintiff David Lavicky maintains his innocence of the theft of the Eckhardt pickup to this day.* On the advice of his attorney he was not able to testify at the state trial and explain what he explained to this federal jury. This properly went to the jury and was open for their consideration in this civil trial (Tr. 259-260) (Tr. 52-53) (Tr. 400-411). The Eckhardts had, since March 16, 1979, told Defendants Burnett, Otis, Coppack and Moore that they believed parts from their stolen vehicle were on the Lavicky 1964 Chevrolet pickup (Tr. 254, l. 8-10) (Tr. 351-353) (Tr. 446-448) (Tr. 265, l. 14-20). The Plaintiff did testify at trial that around that time he traded for, and later put on his 1964 pickup, some secondhand automotive parts he got from two of the boys, Coleman and Joslin, implicated

but not charged with the theft of the Eckhardt pickup. Some of these traded-for, secondhand parts could have come from the Eckhardt pickup (Tr. 404) (Tr. 400-411).

However, in the criminal proceedings against the Plaintiff, no warrants were ever issued to seize and search Plaintiff's pickup on March 16, 1979, despite the March 8 and 9, 1979 information given to authorities by Coleman, Joslin and Mootz. Plaintiff's pickup was just confiscated, miscared for and eventually cannibalized. No automotive part was removed from Plaintiff's 1964 pickup for the purposes of identification to demonstrate third-party ownership at the criminal trial nor any part introduced into evidence in the criminal trial (Tr. 314-315) (Tr. 21, l. 10-11) (Tr. 49, l. 13-23) (Tr. 15, l. 4-25). Only a tool set, purported to have been inside the Lavicky 1964 Chevrolet pickup, was even offered into evidence, but admission was denied by the state trial judge on a renewed trial motion to suppress any such evidence by reason that it came from the illegal search and seizure of Plaintiff's 1964 pickup in Garfield County by Defendants Burnett and Otis (Tr. 340 and Tr. 349). No other item, part or accessory of Plaintiff's pickup was offered into evidence (Tr. 153).

On December 18, 1979, Plaintiff's motion for a new trial in the criminal case tried on November 7th was overruled (Tr. 131). On that day Plaintiff, through his attorney Peter Keltch, requested Defendant Moore to make arrangements for the return to Plaintiff of his 1964 Chevrolet pickup, which was not used in the criminal trial. Defendant Moore advised Peter Keltch, in the presence of Plaintiff and others, that as soon as the Eckhardts removed the parts from the vehicle which they had told him were theirs,

the Plaintiff could have what was left (Tr. 131-133). Defendant Moore commented to Mr. Keltch that if they didn't like it, they could just sue us — sue us if you want (Tr. 133, l. 1-14).

Thereafter, in December 1979, Defendant Moore, Sheriff Coppack and Deputy Otis, without notice to Plaintiff and without hearing or order of the District Court of Alfalfa County (Tr. 89-97) (Tr. 226-227) (Tr. 133), made private arrangements with a garage in Cherokee, owned by Lewis Lavicky, to which Plaintiff's vehicle could be taken for the Eckhardts to identify for themselves [no authority was present to verify what they did (Tr. 94-95)] and remove parts they thought to be theirs (Tr. 450-451) (Tr. 351-354) (Tr. 89-97) (Tr. 99-101). Mr. Lewis Lavicky said he had not told or thought it necessary to tell his father or his brother, the Plaintiff, what arrangements he had made with Mr. Moore for the Eckhardts to come to his shop (Tr. 100, l. 14). The Plaintiff, David Lavicky, didn't know about it. He was shocked and mad to find his pickup ruined on seeing it in January 1980 in the county barn (Tr. 135). Mr. Keltch had no idea why he wasn't notified about the disposition of Plaintiff's pickup prior to January 22, 1980 (Tr. 13, l. 1) (Tr. 135, l. 5), when it was apparently stripped out by January 2, 1980. Mr. Moore testifies at Tr. 316 that the agreement was made between Mr. Lewis Lavicky and the Eckhardts through his office and the Sheriff's office. He then said yes, after being asked whether he informed Peter Keltch of this agreement (Tr. 316, l. 25). It is doubtful that the jury believed that Plaintiff or his attorney knew about this illegal stripdown of Plaintiff's pickup. On cross-examination Mr. Moore later said he

couldn't remember telling or talking to the Sheriff's office about the agreement to strip the pickup (Tr. 352, l. 12-15).

It was Alfalfa County Sheriff's Department, Defendant Sam Otis or Defendant Delmar Coppack, who called Tom Kent and told him to take Plaintiff's 1964 Chevrolet pickup to the private garage in Cherokee. Defendant Otis met Mr. Kent at the garage when the pickup arrived on January 2, 1980 (Tr. 82) (Tr. 453, l. 4-7). The Eckhardts were notified to go to the garage where they ripped out parts. How many is anybody's guess. *The engine, transmission, wheels, gear-shift, stereo, speakers and other parts* mentioned by the Plaintiff at Tr. 400-411 were gone. The seats were torn. The carpet torn. The paint all corroded (Tr. 25) (Tr. 446, l. 18-25) (Tr. 225-227) (Tr. 354). What was left of the Plaintiff's pickup was hauled to the Alfalfa County barn (Tr. 451) after Lewis Lavicky called Defendant Coppack to have it removed from his garage (Tr. 96-97), and Plaintiff was then officially notified in late January 1980 that he could go there to get the remainder (Tr. 134-136). When the Plaintiff saw the condition of his pickup, he left the remainder in the barn (Tr. 125) and went to see Mr. Keltch. Mr. Keltch called Mr. Moore about the dismantling of Plaintiff's pickup and the taking of parts. Mr. Moore told Mr. Keltch to have Plaintiff "contact his insurance company" (Tr. 136).

The damage and loss to Mr. Lavicky's 1964 pickup was far more than even the Eckhardts "claimed" was theirs. If Mr. Lavicky came by his pickup through purchase as he testified, the problems involved with buying various items, some of which might have been previously stolen, as testified to by others, does not make it right or rightful for

"claimers" to randomly rip things out of the buyer's truck with help from governmental officials who were also "claimers" long-time family friends, such as Mr. Moore.

In addition to this testimony, the jury heard extraneous testimony from Eckhardt, Coleman and Mootz that was used at Plaintiff's criminal trial to convict him of the theft of the 1958 Eckhardt pickup. These three people testified to knowing little, if anything, about the taking, searching, transporting and lack of care given to Plaintiff's 1964 pickup by Defendant officials (Tr. 221 and Tr. 380). The Plaintiff's attorneys attempted to stop Plaintiff's civil rights trial from deteriorating into a retrial of him for a 1979 theft of a 1958 pickup by way of a Motion in Limine (ROA 522, 608). The Judge overruled the Motion in Limine and in came pages of prejudicial testimony that had no bearing whatsoever on whether Defendants violated Plaintiff's civil rights in their actions. Certainly it cannot be said by these Defendants that any awards against them by the federal jury for actual or punitive damages to deter the type of conduct in this statement of facts was the result or act of passion, partiality or prejudice of the jury in favor of the Plaintiff, David Lavicky, in this case.

II. SECOND GROUND WHY REVIEW SHOULD NOT BE GRANTED.

B. Characterization of Controlling Law by Petitioner

On page two, three and four Petitioner, Edward L. Moore, quotes what he calls the "relevant constitutional and statutory provisions." Of this case? Or of his Petition for Certiorari? If he means of this case, he is specifically omitting 42 U.S.C. § 1983, a statutory, federal question provision under which this case was brought in federal district court. Maybe it is omitted because it reads this way:

> "*Every person* [*not just governmental unit*] *who, under color of* any statute, ordinance, regulations, custom or usage of any State or Territory, *subjects or causes to be subjected, any citizen* of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law,* suit in equity, or other proper proceeding *for redress.*"

As Respondent reads the above, Mr. Edward Moore was a "person acting under color of state law" who subjected and caused to be subjected a citizen, one David Lavicky, to a deprivation of his constitutional rights, and Mr. Lavicky is entitled to redress from the type of "person" named in § 1983, above, who is personally liable for injuring him in this way.

The Petitioner is interpreting recent case law from this Court in such a way as to write the above statute off the books. To help bolster Petitioner's belief in his right to deprive Mr. Lavicky of his constitutional civil rights redress against Edward Moore personally, he further quotes state statutes: the political subdivision state tort claims act

of Oklahoma 51 O.S. Supp. 1978 § 153 and § 162 and 74 O.S. Supp. § 20f.

It is hard to tell whether Petitioner believes the above quoted state statutes gave Mr. Lavicky a cause of action personally against Mr. Moore, the Petitioner, after Mr. Moore's 1979 actions and at the time of Mr. Lavicky's civil rights lawsuit in 1981 under 42 U.S.C. § 1983. However, it can be definitively said that:

(1) Oklahoma Title 51, the Subdivision Political Tort Claims Act did **not** give Mr. Lavicky a cause of action against **Mr. Moore** personally for the constitutional wrongfulness of Mr. Moore's conduct toward Mr. Lavicky, which conduct rendered him personally ("every person") liable to Mr. Lavicky under § 1983. [This state law has been amended to include *personal liability of state officers,* such as Mr. Moore, an acting state district prosecutor at the time of his wrongful conduct. However, the amendment to include wrongful actions of *state* officers did not become effective until *October 1, 1985.*] Nevertheless, it is still to be seriously questioned if the Petitioner means to contend that at any time, or ever, a state tort claims act will or should take the place of federal question statute 42 U.S.C. § 1983 for governmental officials' personal liability violations of the Constitution of the United States. In fact, state tort claims acts always address and recognize the possibility of paying for any personal liability damages that result from employees' violations of civil rights by individual governmental officials committing unconstitutional acts, and Oklahoma is no exception here. There is even mention in Petitioner's brief at page 23, 1. 13, that since the state of Oklahoma has concurrent jurisdiction with the federal district courts to redress violations of constitutional rights, then the federal

district courts can and should abstain from trying federal question cases. It is hard to imagine that other federal jurisdictional bases, such as federal diversity jurisdiction, are somehow more fundamentally and federally important than case jurisdiction for violations of federal rights.

(2) The Petitioner added to his Petition for Certiorari another state statute, 74 O.S. Supp. 1976, § 20f, shown effective in 1976 and before his wrongful conduct toward Mr. Lavicky. Apparently, this statute renders even *state officials* personally liable, just like private citizens, for actions taken *outside the scope of their authority*. This statute was not cited to the Court of Appeals in his Petition for Rehearing. It was added in an all-out effort to get this Court to adopt a novel theory that if the state **had** some avenue, any avenue, of attack for Mr. Lavicky against Mr. Moore personally, then he cannot redress under § 1983 where he asks a federal jury to consider whether his constitutional rights have been violated by a state officer, Mr. Moore.

In the first place, 74 O.S. Supp. § 20f addresses *only those actions* of an individual working for a state taken *outside* the scope of his employment (general authority). The wrongful actions Mr. Moore took toward Mr. Lavicky occurred during the course of his job, in his general capacity as a state official, i.e., administrative duties, as found by the jury. Further, the jury had *explicit instruction* from the Trial Court that if the jury believed that Mr. Moore was acting in his prosecutorial authority only, when the acts occurred, then Mr. Moore could not be found personally liable under § 1983 because he would be absolutely immune from § 1983 liability by law.

In the second place, Petitioner is speaking both ways, isn't he, when he tries so hard to find a state statute where he could have been *personally sued* by Mr. Lavicky in state court and, therefore, state "remedy" is adequate against "him," and then makes the thrust of this Certiorari the proposition that if Mr. Lavicky had any right to *any kind of relief* at all in a state forum, *and* even if he didn't have any redress against Mr. Moore personally in state court at that time, his constitutional rights were not violated by Mr. Moore or any other "person" acting under color of state law because the "state" didn't know or intend to violate his rights.

III. THIRD GROUND WHY REVIEW SHOULD NOT BE GRANTED.

C. Improper Interpretation of § 1983 Liability of State Workers

From Petitioner Moore's brief for granting certiorari, pages 18 and 22:

> "However, their conduct (Defendants' individual conduct) was 'random and unauthorized' from the point of view of the State of Oklahoma which has established a statutory procedure for determining ownership of stolen property. 22 O.S. 1981, §§ 1321-1322. Indeed, there is no conceivable way the State of Oklahome could anticipate or forestall the failure of state actors to follow the statutory procedure, whether that failure is negligent or intentional. The State is simply not in a position to provide for pre-deprivation process before its employees disposed of the truck without following the proper statutory procedure. *Parratt* and *Hudson* were intended for just such circumstances as this."

> "The adoption of the wrong theory by the Court of Appeals leaves public officials throughout the Tenth Circuit at jeopardy from unnecessary federal litigation where the states of that circuit provide constitutionally adequate post-deprivation remedies. It literally results in making federal cases of simple matters which, as here, deal only with the ownership and disposition of property."

In response to the above, Respondent Lavicky would like to refer the Court to his response to Appellant Moore's Petition for Rehearing in the Tenth Circuit Court of Appeals filed in June 1985.* The reason is twofold. First, there is insufficient time now to respond fully to the above position of your Petitioner Edward Moore. Second, there is insufficient space here to do justice to the confusion engendered by *Parratt* and *Palmer* which I refer to there as *Parratt-Palmer analysis*. I will excerpt some of it to make this ground for denial of review. In a word, I would refer the Court to *Lugar* v. *Edmondson Oil Co., Inc., et al.*, 457 U.S. 922 (1982), for its analysis of the relationship of the "state action requirement" of the Fourteenth Amendment and the "acting under color of state law" for individual violations under 42 U.S.C. (1983). *Lugar* further reiterates the historic purpose of § 1983 recognized in *Monroe* v. *Pape*, 365 U.S. 167 (1961), which is to prevent individual state officials from using the cloak of their official authority under state law to violate citizens' rights and guarantees. Much of Petitioner's argument was rejected by the majority in *Monroe* v. *Pape* long ago.

Who is the "state," anyway? If the "state" legislates its employees to do right, does that cloak state employees from all personal unconstitutional conduct? Isn't Petitioner

really wanting a state statutory cloak of worker immunity to write § 1983 off the books as far as state employees' personal liability is concerned? And who said this case was a *simple matter* of "ownership and disposition of property?" The same state that vows to protect Mr. Lavicky's fundamental constitutional rights in its state court if the federal court abstains?

This case involved liability for the "wrongful conduct of governmental officials acting under color of state law," not a "determination of ownership and disposition of property." All events arise from a set of circumstances, but the events themselves can give rise to a cause of action in their own right, as here. Cases which address the rightfulness or wrongfulness of the conduct of governmental officials operating in a constitutional framework are not to be taken lightly in any democracy. The fact that this must be written in response to a brief of the Attorney General of a State shows how serious this comment is.

*EXCERPTS FROM RESPONSE TO PETITIONER MOORE'S PETITION FOR REHEARING IN THE TENTH CIRCUIT

II. The Procedural Due Process Violations Here Using Parratt-Palmer Analysis

Assuming arguendo, that Mr. Lavicky's constitutional cause of action against Defendant Moore and others is limited to procedural due process violations, **and** that a state remedy **had existed** in Oklahoma assessing Moore's and other officials' conduct, post-deprivation, **and** that the *Monroe* v. *Pape*, 365 U.S. 167 (1961), abuse of power and authority doctrine is no longer applicable to Defendant

state actors violating procedural due process, **and** that **Palmer** reasoning should be retroactively applied to "intentional deprivations of property cases," **then** this Court would have to hinge a procedural due process decision on whether or not the conduct of Defendants Moore, Coppack and Otis in relinquishing Lavicky's pickup to the Eckhardts for demolition was **part of and pursuant to acceptable and established practices in the handling of private property in "state" custody and control in order to be fairly attributable to the "state" under the Fourteenth Amendment limitation of protection against "state action" according to Parratt-Palmer analysis.**

Plaintiff believes the record shows [excerpts follow this Part II] *that this conduct was part of and pursuant to accepted and established courses of conduct in the handling of private property in the custody and under the control of named state actor officials.*

The ungarnished fact that Oklahoma had statutory frameworks for handling property in state custody and control, and 22 O.S.A. § 1321 and § 1322 [which] might have been applied here, which book procedures were ignored by Defendant state actors, does not mean they were acting *without all* the authority of state. Exercises of state authority can be found by studying the courses of conduct and the acceptable attitudes of "the right way to do it" of Defendants faced with varying factual situations. The Defendants themselves had a positive attitude that they acted within their authority in the manner they handled the property. They denied legally improper conduct in court. All Defendants here agreed with and accepted Defendant Moore's planned approach and helped create and

carry the plan into effect. The planning and coordination with others made it impossible to act randomly. The argument now is that the conduct was **unauthorized** by written state law and, therefore, no pre-deprivation opportunity to be heard was warranted because the state also had adequate post-deprivation remedy. [*What remedy? is the first question.*] Further, as Justice Logan noted in his ruling, Defendant Moore indicated he believed he had a **duty** to turn over the allegedly stolen parts to the Eckhardts.

And Justice Frankfurter knew in 1940 that:

> "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text." *Nashville C. & St. L. R. Co.* v. *Browning*, 310 U.S. 362, 369 (1940).

As a matter of fact, all the cases cited by this Court for purposes of this response on "established state procedure" in order to attribute the intentional or negligent violating acts of state officials to the "state" and complete the state action requirement for constitutional deprivation **by the state** under the Fourteenth Amendment ("no state shall deprive . . .") analysis according to Parratt-Palmer procedural due process analysis, do **not** limit cognizable § 1983 claims to those **where written** state laws or policies **have not been violated** by state officials, **or** only those cases

where the violation lies in the procedural **structure of the written state law or policy.**

Court scrutiny continues into the way things are *actually or usually done* in similar contexts and the official attitudes about those matters in order to find the real way the state is carrying on its business. And, again, under Parratt-Palmer if the accepted practices are without pre-deprivation opportunities to be heard and an emergency isn't shown, then something the "state" generally does is constitutionally wrong no matter what the [state] books say to do.

In recent cases, such as those mentioned by this Court, "attribution for state action" Parratt-Palmer analysis is *compared to* city officials' actions when deciding whether to hold the city "itself" liable for official constitutional deprivations as an "individual" under § 1983. ("No individual acting under color of state law shall deprive . . .".) Often a Parratt-Palmer analyzed case will make reference to a case deciding municipal (or political subdivision) liability under *Monell* v. *Dept. of Social Services*, 436 U.S. 658 (1978) **standards** for attributing officials' actions *to the city*, because there is no respondeat superior liability or vicarious liability, *only individual* [*actor*] *liability under § 1983*. For example, *Burtneiks* v. *City of New York, et al.*, 716 F.2d 982 (2nd Cir. 1983), a procedural due process case against the city and city officials who failed to follow the municipal code procedures and were sued for intentional demolition of a building without predemolition opportunity to be heard by the owner, relied on *Rookard* v. *Health and Hospitals Corp.*, 710 F.2d 41 (2nd Cir. 1983), a case deciding whether there is a § 1983 cause of action against

a political subdivision. *Burtneiks*, supra, says in order to attribute officials' actions under Parratt-Palmer Fourteenth Amendment state action analysis:

> "In our view, however, decisions made by officials **with final authority over significant matters,** which contravene the requirements of a written municipal code, can constitute **established state procedure.** Cf. Rookard, 710 F.2d at 45.":
>
> and, **Rookard:**
>
> "The difficulty, of course, lies in identifying those officials whose actions, because they may be fairly treated as the municipality's acts, establish policy. **Where an official has final authority over significant matters involving the exercise of discretion, the choices he makes represent governmental policy."**

But one cannot help noticing the *reverse-purpose attribution in* Parratt-Palmer analysis even though municipality liability standards *are used to determine state action*. One attributes acts of city actors to a city to decide if a **city itself,** separate from the governmental actors, should be held amenable to a § 1983 suit. One attributes **acts of state actors** to the state in Parratt-Palmer to decide if the **state actor** should be held amenable to a § 1983 suit. **Usually when acts are attributed, or anything else for that matter, it is to determine the status of the "individual" to whom the acts are attributed.** There is no controversy with looking for "attribution to the state" to fairly decide if the state *itself* [like cities] should be amenable to § 1983 suit, but there is controversy with drawing a *new line* between governmental officials and their governmental employer for Fourteenth Amendment "state action" purposes [to decide

if *state officials* themselves should be amenable to § 1983 suit]. See *Lugar*, Part IV, not in accord.

And if Parratt-Palmer insists in drawing that line, courts generally must acknowledge that "fair attribution" occurs for *Monell* municipality liability purposes in a *broader range of circumstances* than just checking to see if the official followed or did not follow a "book procedure." Even a restrictive reading of *Monell* from the Fifth Circuit in *Bennett* v. *City of Sidewell*, 728 F.2d 762 (5th Cir. 1984), recognizes definitions of attributable city officials' actions to cities (and, by analogy, Parratt-Palmer state action requirement) in **courses of conduct well settled** so as to constitute custom or usage **with the force of law** formally **or informally** adopted, and custom is one form which policy takes and by which it is proven and **patterns of conduct in actual practice** may be called customs. The pattern of conduct and care toward private property in present Defendants' custody and control had the force of law in Alfalfa County, even if not formally "on the books." Present Defendants had final authority over disposal of Lavicky's pickup, and they knew it and chose openly what to do in a planned and publicly known pattern of conduct toward property officially held in that county. All Defendants saw nothing wrong or unusual about their conduct under state law and did it easily after the pickup had been in state custody and control for over nine months. There were nine months to think what to do if any Defendant had doubted his ability to dispose of the pickup lawfully and with state authority.

Should we look at dead letter statutory law in that county and hold the Defendants were acting without all official authority or look to the higher calling to duty **clearly claimed** by Defendant Moore and accepted by all who felt it in their legal discretion and obligation as state actors to dispose of the pickup to the Eckhardts, dispensing with mere book procedures?

Before turning to the record this Court also drew attention to *McKee* v. *Heggy*, 703 F.2d 482 (10th Cir. 1983). Here the Court sought out **customary procedures** of the Oklahoma City Police Department to see if the acts of officials who wrongfully disposed of an impounded auto could be attributed *to* Oklahoma City to determine *the city's* amenability to § 1983 suit. It noted the evidence of record and implied in footnotes that *these same considerations* would be considered in Parratt-Palmer analysis to see if *city officials* were also amenable to § 1983 suit. Therefore, the idea of "state action reverse-purpose attribution" has come to the Tenth Circuit. However, it was also noted in *McKee* . . . that the **feasibility** of providing *pre-deprivation* opportunity to be heard shall be *carefully* studied in the Tenth Circuit before it is decided that the *post-deprivation* state remedy, if existing, is **adequate** for procedural due process purposes. The Tenth Circuit views feasibility inquiry as more than the obvious impracticability of the governmental body preventing an individual official's deprivational act and makes it include the Supreme Court inquiry into the *urgency for immediate deprivation for the public good* as opposed to consideration for the rights of the citizen being deprived. (Appellee Brief, pages 9-15)

III. A Closer Look at Parratt-Palmer Analysis and § 1983

Just as this case, on its facts, is not an "all fours case for nonliability" for any Defendant herein, including Defendant Moore, seeking to use recent Supreme Court pronouncements of the requirements for cognizable violations of **procedural due process** to eliminate his liability, so must recent Supreme Court pronouncements of requirements for cognizable **procedural due process** causes of action be read against the historical facts, purpose and precedent of American civil rights law. I sincerely believe when this process is undertaken by the Supreme Court, and it most assuredly has not yet been undertaken so as to provide any consistency to interpretation and comparison of all civil rights issues, much of the controversial aspects of the "new state action" teaching will be modified. Otherwise, blaring inconsistencies will continue to arise. The process has already begun. This part of the brief will focus on examples of established precedent, still used by the Supreme Court in other civil rights issues, except procedural due process analysis, and examples of arising inconsistencies on all civil rights issues if Parratt-Palmer inquiries are not carefully read and interpreted along with the realistic "teachings" of established civil rights precedent.

For example:

(1) Parratt-Palmer analysis is causing some courts to exclaim that "a finding that **state action** violated an independent substantive right secured by the Constitution is 'qualitatively' different from a finding that such state action **simply** deprived a citizen of his right to procedural

due process" *Owen* v. *Lash*, 682 F.2d 648, 651 (7th Cir. 1982), quoted in *Spell* v. *McDaniel*, supra.

But the Supreme Court in *Palmer and Parratt* rested their decisions on the basis that no, **absolutely no**, constitutional violations had ever occurred, including procedural due process violations. Yet there is justified confusion above about these holdings because of the uncertainty of knowing when and how much state actor activity to attribute to a state *even to hold the state actor liable for his own actions and even if* his acts are attributed to the state, maybe the state can "fix everything" by providing some kind of post-deprivation relief. Yet the importance of procedural due process properly applied is still with us:

> "Procedural due process rules are meant to protect persons **not** from the deprivation, but from the mistaken or unjustified deprivation of life, liberty or property." "The right to procedural due process is absolute in the sense that it does not depend on the merits of a claimant's substantive assertions." "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, **whatever** the ultimate outcome of the hearing." *Carey* v. *Piphus*, 435 U.S. 247 (1978).
>
> "There is no warrant for any separation of constitutional rights into redressable rights and nonredressable rights, of major and minor unconstitutional deprivations, and § 1983 makes no such distinction and authorizes no separation." *Pritchard* v. *Perry*, 508 F.2d 423 (4th Cir. 1975).

(2) The dissent in *Bennett* v. *Sidewell*, supra, at 771, pointed out that the majority's holding *restricting the acts of city officials fairly attributable to the city* to the acts

of high officials in policymaking positions only, and not to those officials given discretion by the city to alter or set their own policies and customary procedures, will effectively allow cities to **immunize** themselves from § 1983 liability for the unconstitutional actions of their appointed officials merely by articulating "facially constitutional" policies in the substantive areas in which officials perform their delegated duties.

Since Parratt-Palmer places so much emphasis on the separateness of the "state" from its "state actors," the above danger can be expressed in this context, also. For instance, Defendant Moore argues that the state statutes for handling exhibits or allegedly stolen goods in Oklahoma are "facially constitutional and on the books" and **immunize him** from suit because any intentional acts of deprivation of Lavicky's property were unjustified solely because he failed to follow these facially adequate book procedures and, therefore, nothing he did was authorized [by the state legislature] and cannot be attributed *to the state* which immunized him by setting up these "facially constitutional procedures" for state actors to follow — so, since there must be a wrongful action by the **state** under the Fourteenth **before he** can be found liable as an individual acting under color of state law under § 1983, he is not liable This overwrites **Parratt-Palmer** analysis to a complete overruling of *Monroe* v. *Pape*, 365 U.S. 167 (1961), which these two cases do **not** purport to do. See *Lugar*, and dissent, infra. (Appellee Brief, pages 32-34)

* * *

These questions are issues in store for courts that follow Parratt-Palmer type thinking without caution, but also questions for **another case where** attributable courses of conduct **do not exist, and** one in a purely procedural due process setting, **and** where a meaningful, available state tort remedy exists to help redress takings to prevent process injustice. And further, Defendant Moore applies far too strict a reading to "acts deemed attributed and, therefore, authorized" by the state under Parratt-Palmer-Logan analysis, as pointed out in Part II. The legislative or other written word on a substantive area of law or policy *is not always the last word attributable to the state* on the subject, and if the last attributed word on the subject is state actor, constitutionally deficient, *policy, custom and usage* (routinely accepted courses of conduct), *then that, too, attributes to the state,* authorizing the conduct, and the Parratt-Palmer state action requirement for a procedural due process violation is met in that way.

For it cannot be denied [at the very least] that an opportunity to be heard prior to final deprivation of his pickup was deliberately denied Mr. Lavicky in this case by these Defendant state actors. A procedural due process violation occurs by Defendant state actors, even under Parratt-Palmer, rendering a post facto state remedy *if any,* **inadequate** as due process . . . when a pre-deprivation of property opportunity to be heard is **not** given *by* operation of a commonly accepted routine, **on the books or not, and** fairly attributable to the state by existence of the applied practice itself; and where it would have been feasible (or enough time available without undue systemic strain) to provide the citizen due process before final deprivation of

his property. There was no stated or recognized need in evidence shown to rush final disposal of Mr. Lavicky's pickup by these Defendants. (Appellee Brief, pages 38-39)

* * *

CONCLUSION

In Conclusion, persons working for state government, like Mr. Moore, seek a special immunity or cloak from § 1983 liability by claiming that state employee liability should be determined by the same type of criteria and attribution needed to find municipalities (or other political bodies) "personally" liable under § 1983. Since state government cannot be sued directly under § 1983, those working under color of state law *as state employees* are studying ways through confusion, such as "is their unconstitutional conduct attributable "personally" to the state body?" in order to make determinations of their personal liability *hinge on and mean* the type of § 1983 liability attributional findings that would be needed to determine the liability, if allowed, of the state for which they work. Such reasoning misses the wording and intent of § 1983 personal liability to curb abusive use of state power and would create different liability standards between state employees and others operating under color of state law. However, this case was decided correctly under all precedent, even under Parratt-Palmer type analyses, because Mr. Moore's conduct exclaimed an unconstitutional attitude and followed an organ-

ized, unconstitutional, but routine, practice for the state of Oklahoma in those counties. Therefore, review here is inappropriate under all precedent.

Respectfully submitted,

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November, 1985

CERTIFICATE OF SERVICE

I hereby certify that on the ..... day of November, 1985, service of this Brief in Opposition was made by placing three (3) copies of same in the United States Mail, postage fully prepaid, to Robert A. Nance, Asst. Attorney General, Deputy Chief, Federal Divisions, 112 State Captol Building, Oklahoma City, Oklahoma 73105.